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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/788,177	02/16/2001	John David Tucker	KCC-16,190	5302

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EXAMINER

COLE, ELIZABETH M

ART UNIT	PAPER NUMBER
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1771

10

DATE MAILED: 07/28/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/788,177

Applicant(s)

TUCKER ET AL.

Examiner

Elizabeth M Cole

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**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --****Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 May 2003.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-45 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-45 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)                      4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)                      5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2                      6) ☐ Other: \_\_\_\_\_

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -  
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-2,4-9, 11-13, 16-21, 23-26, 29-33, 35-40, 42-45 are rejected under 35 U.S.C. 102(b) as being anticipated by WO 98/44025 to Stopper et al.

Stopper et al discloses a biodegradable stretch-thinned film comprising a first olefin polymer, a filler such as calcium carbonate and an additional polymeric material. The olefin polymer should be present in an amount of at least 50%. The additional polymer material may comprise styrene, nylon and polyester. The olefin polymer may comprise polyethylene, particularly linear low density polyethylene, polypropylene and a blend of polyethylene and polypropylene. See pages 7-8. Therefore, the olefin polymer, particularly polyethylene and linear low density polyethylene corresponds to the matrix polymer. The additional polymer and/or the blending of polypropylene with the polyethylene corresponds to the incompatible polymer. The filler material may be present in an amount of 40-70 percent by weight. See page 9, lines 1-2. The stretch-thinned film may be bonded to additional layers which would correspond to the claimed skin layers. See page 11. The stretch-thinned film may also be bonded to nonwoven fabrics, such as spunbonded, meltblown and staple fiber fabrics. The stretch-thinned film may be incorporated into personal care products such as absorbent articles. With regard to the limitation that the matrix polymer consists essentially of an ethylene homopolymer or copolymer, the transitional phrase "consisting essentially of" limits the scope of a claim to the specified materials or steps "and those that do not materially affect

the basic and novel characteristic(s)” of the claimed invention. In re Herz, 537 F.2d 549, 551-52, 190 USPQ 461, 463 (CCPA 1976). ). For the purposes of searching for and applying prior art under 35 U.S.C. 102 and 103, absent a clear indication in the specification or claims of what the basic and novel characteristics actually are, “consisting essentially of” will be construed as equivalent to “comprising.” See, e.g., PPG, 156 F.3d at 1355, 48 USPQ2d at 1355. Applicant bears the burden of showing that the additional steps or components would materially change the characteristics of applicant’s invention. In re De Lajarte, 337 F.2d 870, 143 USPQ 256 (CCPA 1964).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 98/44025 to Stopper et al in view of Burns, Jr et al, U.S. Patent No. 6,328,723.

Stopper et al discloses the claimed invention as set forth above. Stopper et al differs from the claimed invention because Stopper does not teach employing ultra low density polyethylene as the matrix polymer. Burns, Jr. et al teaches at col. 6, lines 35-50 that ultra low density polyethylene is known to be equivalent to the polymeric materials set forth in Stopper for the purpose of making filled, stretch-thinned breathable films.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have employed ultra low density polyethylene. One of ordinary

skill in the art would have been motivated to employ ultra low density polyethylene because of the teaching of Burn, Jr. that ultra low density polyethylene is equivalent to the polymers set forth in Stopper et al. With regard to the limitation of employing waste polymeric materials as the incompatible polymer in the blend, it would have been obvious to have used such waste polymers motivated by the expectation that waste polymers are readily available, are less expensive and their use is environmentally friendly. With regard to the relative proportions of the incompatible polymer and the matrix polymer, Stopper et al teaches employing at least 50% of the matrix polymer. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have optimized the relative proportions of the matrix polymer and the incompatible polymer through the process of routine experimentation in order to produce a film having the desired properties that the incompatible polymer would provide to the film.

2. Applicant's arguments filed 5/14/03 have been fully considered but they are not persuasive. Applicant argues that Stopper does not anticipate the claims as amended because Stopper does not disclose the inclusion of a polymer incompatible with a matrix polymer within the breathable film. Applicant argues that Stopper instead teaches the inclusion of a compatible polymer. However, the specification at page 9 states that where the primary matrix polymer is polyethylene or a combination hereof, suitable incompatible polymers include, without limitation, polypropylene, a propylene polymer, a propylene ethylene copolymer, polystyrene, nylon and polyester. Stopper discloses the material may comprise a polyethylene polymer which may be blended with polystyrene, nylon, polyester and/or polypropylene. Therefore, Stopper anticipates the claimed invention.

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3. With regard to the combination of Stopper and Burns, Applicant argues that Burns does not teach the equivalency of ultra low density polyethylene to the polymers listed in Stopper. However, Burns recites a list of polymeric materials which are suitable for use to form breathable films which includes those listed in Stopper and, in addition, also lists ultra low density polyethylene. Therefore, Burns teaches that these materials were recognized in the art as being equivalents which were known to be useful for the same purpose and therefore, it would have been obvious to have employed the ultra low density polyethylene in Stopper. Further with regard to the combination of Burns and Stopper, Applicant argues that neither Burns nor Stopper teach employing an incompatible polymer with the matrix polymer. However, this argument is addressed above with regard to Stopper. With regard to the proportions of the matrix polymer and the additional polymer, Stopper teaches that at least 50 percent of the film should comprise a polyolefin. It would have been obvious to have selected the optimal amounts of the other component such as nylon, polystyrene or polyester through the process of routine experimentation in order to arrive at a film having the desired properties. With regard to the argument that waste polymers include additional components, as set forth in the body of the rejection, the use of the transitional phrase "consisting essentially of" will be considered to be equivalent to the transitional phrase "comprising" for purposes of search and examination absent a showing by Applicant that any additional components would affect the basic and novel characteristics of the invention.

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4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth M. Cole whose telephone number is (703) 308-0037. The examiner may be reached between 6:30 AM and 5:00 PM Monday through Thursday.

Mr. Terrel Morris, the examiner's supervisor, may be reached at (703) 308-2414.

Inquiries of a general nature may be directed to the Group Receptionist whose telephone number is (703) 308-0661.

The fax number for official faxes is (703) 872-9310. The fax number for official after final faxes is (703) 872-9311. The fax number for unofficial faxes is (703) 305-5436.

  
Elizabeth M. Cole

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Primary Examiner  
Art Unit 1771

e.m.c  
July 14, 2003